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7 Attorney for Defendants Napier and Barnes

8 IN THE UNITED STATES DISTRICT COURT

9 FOR THE DISTRICT OF ARIZONA

10 Robert Steven Cutler, individually and as  
11 Administrator of the Estate of David A.  
12 Cutler, deceased, on behalf of himself and  
13 on behalf of all beneficiaries of the Estate  
14 of David A. Cutler, deceased, and Renee  
15 Luddington Cutler;

16 Plaintiffs,

17 vs.

18 Mark D. Napier, Sheriff of Pima County,  
19 Arizona, in his official capacity; Rural  
20 Metro Fire Dept., Inc., an Arizona for  
21 profit corporation; Keith Barnes and Jane  
22 Doe Barnes, his spouse; Grant Reed and  
23 Brittany Reed;

24 Defendants.

NO. CV-18-00383-TUC-FRZ

DEFENDANTS NAPIER AND  
BARNES' MOTION FOR SUMMARY  
JUDGMENT

(Oral Argument Requested)

(The Honorable Frank R. Zapata)

21 Defendants Pima County Sheriff Mark D. Napier and Pima County Sheriff Deputy  
22 Keith Barnes and his wife Jane Doe Barnes move for summary judgment pursuant to Rule  
23 56, Federal Rules of Civil Procedure, on all of Plaintiffs' claims.  
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**FACTUAL BACKGROUND**

Twenty-three-year-old David Cutler (Cutler) died on June 5, 2017. (SSOF 2.) Medical Examiner David Winston MD attributed Cutler's death to Hyperthermia due to exposure to the elements, and LSD toxicity. The toxicology analysis documented LSD in Cutler's blood. (SSOF 1, 3-6.) After Cutler's death, a sample of LSD from the batch taken by Cutler was brought to the Sheriff's Department by Cutler's father, and the sample tested positive for a useable quantity of LSD at the DPS Crime Lab. (SSOF 7.) Dr. Winston testified that LSD is the classic drug people talk about having a trip, getting high, having hallucinations; and that LSD had a toxic effect on Cutler's body, and put him in a situation where he was walking through the desert with no clothes on. Dr. Winston testified the LSD raised Cutler's body temperature and contributed to his heat-related death. (SSOF 8, 9.)

On autopsy, Dr. Winston found no blunt force trauma that contributed to Cutler's death, no blunt force trauma that caused skull fracture or caused damage to the brain. The hyoid bone and laryngeal cartilages were intact, ruling out strangulation. (SSOF 10-14.) Dr. Winston did not find any burns on Cutler's body that he could associate with being on the ground or on hot rocks. (SSOF 15.)

Hyperthermia and increased respiration rates are known complications of LSD, according to Dr. Winston. (SSOF 16, 17.) After meeting with Cutler's father, Robert Cutler, who earned a Ph.D. in chemistry in approximately 1980 but worked in finance and IT and is now retired, Dr. Winston changed the autopsy cause of death from LSD toxicity to Hyperthermia due to exposure to the elements and LSD toxicity. (SSOF 18, 19.) Dr.

1 Winston did not agree with Dr. Cutler that it was highly likely that the ketamine  
2 administered by Rural Metro caused Cutler to go into cardiac arrest and therefore, along  
3 with hyperthermia, was a key cause in his death; or that LSD was not a cause of death. Dr.  
4 Winston wrote that LSD was a contributing factor to the cause of death, and he still believes  
5 that today. (SSOF 20, 21.)

7 Cutler took LSD and then text messaged with his girlfriend Megan Cypcar (Megan)  
8 in North Carolina, confirming he had taken LSD, stating he was “tripping so hard.” Cutler  
9 sent Megan LSD-related YouTube videos, and exchanged “I love you” texts. Cutler’s last  
10 text to Megan was at 9:04 North Carolina time, 6:04 a.m. Tucson time on June 5, 2017.  
11 Megan sent several more texts to Cutler, but Cutler stopped responding. (SSOF 22-32.)

13 At around 9:40 am on June 5, 2017 Pima County Sheriff’s Department units were  
14 dispatched to a 911 report of a fire in the vicinity of Melpomene and 22<sup>nd</sup> Street on  
15 Tucson’s far east side. (SSOF 33, 34.) Deputy Keith Barnes, Deputy Christopher  
16 Davenport and Rural Metro Fire Department were among the responders to the fire. The  
17 fire destroyed a Jeep Wrangler, later found to be owned by Cutler. Rural Metro  
18 extinguished the fire. Deputy Davenport traced the Jeep tire tracks from the location of the  
19 fire back through a desert area that showed the Jeep had been driven through bushes, over  
20 cactus and through a steep wash. Despite search efforts, no one associated with the Jeep  
21 was found. (SSOF 35, *See* Photos Ex 15; SSOF 36-39.)

24 Defendant Deputy Barnes and Defendant Rural Metro Paramedic Grant Reed were  
25 among the responders that went to the fire call. Both Rural Metro Paramedic Grant Reed  
26

1 and Rural Metro EMT Vince Figueroa participated in putting out the Jeep fire. (SSOF 38.)

2       At 11:32 a.m., two hours after the fire call, local resident Kristen Powell called 911  
3 from her home and reported someone on the hill behind her home, naked and screaming for  
4 help. (SSOF 40.) Deputy Barnes had recently left the Jeep fire call location, and was en  
5 route to this new call at 11:34:24, with lights and siren. (SSOF 41, 42.) At 11:39:50  
6 Deputy Barnes arrived and saw a naked person standing at the very top of the hill in a pose  
7 that looked to Deputy Barnes like a “Jesus on the cross” pose. (SSOF 43.) Deputy Barnes  
8 tried to use the PA system on his patrol SUV to order the man to come down to him, but the  
9 PA system did not work. Barnes yelled saying he was Sheriff’s Department, that he was  
10 there to help, and asked the man to come down. The naked man on top of the hill took off  
11 running east, away from Deputy Barnes, and yelling. (SSOF 44.)

12       Deputy Barnes climbed up the hill through brush and loose rocks, for about a quarter  
13 of a mile. Deputy Barnes lost visual of the man so he would walk and then stop and look  
14 up, catch his breath, so that if the man started coming that way Deputy Barnes would be  
15 prepared for anything. (SSOF 45.) Despite Deputy Barnes telling him to come towards  
16 him, that he was there to help, the man did not come down or walk towards Deputy Barnes.  
17 (SSOF 46.)

18       At 11:46:59, Deputy Barnes advised he was with the subject on top of the mountain.  
19 Deputy Barnes also advised the radio dispatcher that he was going to need meds. The  
20 Radio Log Summary shows that at 11:47:20, Deputy Barnes called for medical assistance.  
21 (SSOF 47, 48.) At 11:45, Rural Metro got the call for medical assistance. (SSOF 49.)

1 Deputy Davenport, still at the Jeep fire location, announced at 11:48:58 he had sight of  
2 Deputy Barnes, and was going to make his way to Barnes' location. The distance from the  
3 Jeep fire location to Deputy Barnes' location was approximately a half mile, if not further.  
4 (SSOF 50, 62.)  
5

6 Defendants have provided an aerial photo labeled with the various locations (SSOF  
7 33, Ex 12) and a drone video showing the rugged terrain and the various pertinent locations.  
8 (SSOF 51, Ex 24.) Reviewing the aerial photo and the drone video is critical to  
9 understanding the physical and geographical environment with which the deputies and  
10 Rural Metro were dealing.  
11

12 At the top of the hill, Deputy Barnes again asked Cutler to come toward him. Cutler  
13 then put his head down, and looking down, yelled, "Just decapitate me, just decapitate me."  
14 (SSOF 52.) Deputy Barnes told Cutler that he wanted to handcuff Cutler, and Cutler  
15 complied. (SSOF 53.) Barnes initially thought he recognized Cutler from a prior contact.  
16 Cutler said something to the effect of, "Hey, Deputy Barnes." Deputy Barnes said, "Hey,  
17 what's going on", and Cutler said something about his car. It turned out later Cutler was  
18 not the prior contact Barnes was thinking of. (SSOF 54.) Deputy Barnes radioed he wasn't  
19 sure how he was going to get Cutler down the hill, that Cutler was delusional and bleeding  
20 from the face. Deputy Barnes asked if the ambulance was responding, Barnes was told they  
21 had been advised. Deputy Barnes asked for PCSD Search and Rescue to respond in order  
22 to help get Cutler down from the hill. (SSOF 55,56.)  
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26 Deputy Barnes saw that Cutler was covered with blood. Deputy Barnes asked Cutler

1 if he was able to walk back. Cutler responded: “I don’t want to go back, I don’t want to go  
2 back.” Cutler pulled away from Deputy Barnes like Cutler was going to go over the other  
3 side of the hill. Deputy Barnes grabbed Cutler and took Cutler to the ground. (SSOF 57.)  
4 Once on the ground, Cutler started shaking and yelling, talking something about bombing  
5 Iraq. Cutler said that he’s sorry for his parents, and that he wanted to say goodbye to his  
6 mom. Then Cutler started talking about the devil and said if we don’t kill the devil, we’ll  
7 never be able to finish the wars. (SSOF 58.) Cutler then started trying to roll off the side of  
8 the hill. Deputy Barnes grabbed Cutler by the arm and Cutler stood up. Deputy Barnes  
9 directed Cutler back to the ground. There was no shade to put Cutler under and Cutler was  
10 red as a firebox. (SSOF 59.) While on the ground, Cutler began banging his head on the  
11 rocks. Deputy Barnes put his right foot under Cutler’s head, so that Cutler was banging his  
12 head on Deputy Barnes’ right foot instead of on the rocks. (SSOF 60.)

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16 Then Cutler started kicking and flailing and trying to roll down the side of the hill  
17 again. (SSOF 61.) Deputy Davenport arrived. He described that Cutler was trying to get  
18 up and run, and that Cutler kept trying to roll down the hill. Davenport described Cutler as  
19 combative, in that he wasn’t listening to commands, kept trying to get away, was thrashing  
20 about, his feet and legs were thrashing about. (SSOF 62, 63.) Deputy Dittmer arrived with  
21 a RIPP strap restraint to control Cutler’s feet. Deputy Barnes described Cutler as “just  
22 flipping around like a, a gator.” (SSOF 64.) Deputy Barnes did not have water and did not  
23 ask for water or a blanket to be brought up to the hilltop. The deputies normally carry about  
24 30-35 pounds of equipment and body armor. Deputy Barnes testified that his focus was to  
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1 get Cutler off that mountain and down to the ambulance so Cutler could get medical  
2 attention. (SSOF 65.)

3       The terrain was rocky, slippery, with a lot of brush and cactus. (SSOF 70.) The  
4 three deputies initially tried to pick Cutler up and carry him down the hill, but Cutler kept  
5 kicking and bucking. They carried Cutler about ten feet, began to lose their footing, and  
6 were unable to carry Cutler any farther. (SSOF 66.) Cutler rolled into a thick, thorny bush  
7 and didn't react to pain. Deputy Ernst arrived. (SSOF 67.) Deputy Barnes got on the  
8 radio and talked to Search and Rescue about needing help to get Cutler down the hill.  
9 (SSOF 67 - 71.) Deputy Barnes advised Cutler was restrained but still delusional and  
10 combative, but to have Meds respond, that the deputies needed assistance. (SSOF 72, 73.)  
11 After they got Cutler to a cleared area, he seemed to calm down. Deputy Barnes asked  
12 Dittmer to video Cutler's behavior using her cell phone; Cutler was wiggling and thrusting  
13 his hips into the ground, thrashing about and making unintelligible verbal noises. (SSOF  
14 74, 75, *See* Ex 30A, 30B and 30C.) Davenport heard Barnes request Medical multiple  
15 times. (SSOF 76.) Hospital and autopsy photos show how scratched and scraped Cutler  
16 was from being in the desert naked for two hours. (SSOF 77.)

17       Rural Metro personnel arrived. Paramedic Grant Reed testified that the deputies were  
18 trying to restrain Cutler, had Cutler suspended up off the ground, but Cutler was fighting  
19 them quite a bit, and the deputies were struggling to keep hold of Cutler. Cutler was  
20 "flailing back and forth, trying to fold back and forth like a child throwing a temper  
21 tantrum. Kicking, flailing, and definitely tossing them around." (SSOF 79.) The Rural  
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1 Metro Patient Care Report shows Rural Metro received the call and was dispatched at  
2 11:48:00; was on scene at 12:07:34 and at the patient's side at 12:13:00. It shows the  
3 patient was transported by Rural Metro at 12:35:00 and arrived at Tucson Medical Center at  
4 12:54:00. (SSOF 80.)  
5

6 After arriving on the hilltop, Rural Metro Paramedic Grant Reed injected Cutler with  
7 Ketamine, a sedative. (SSOF 81.) Search and Rescue Deputy West arrived and helped get  
8 Cutler off the hilltop via a wheeled Stokes basket. (SSOF 82.) Cutler had become  
9 nonresponsive and was pronounced dead later at Tucson Medical Center. (SSOF 83.) A  
10 summary timeline of the call is included in the Statement of Facts. (SSOF 84.)  
11

12 None of the responding deputies (Barnes, Davenport, Dittmer, Ernst, West) had  
13 water with them. Their primary objective was to physically control Cutler to keep him from  
14 further injuring himself in the rough terrain, and to get Cutler off the hill quickly and to the  
15 ambulance. It took 41 minutes from the time of the 911 call, sedation by Rural Metro and  
16 use of the wheeled Stokes basket to accomplish that. Deputy Barnes had custody of Cutler  
17 for at most 26 minutes, from the time Deputy Barnes was first with Cutler until the time  
18 Rural Metro took over Cutler's care.  
19  
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### 21 **SUMMARY JUDGMENT PRINCIPLES**

22 Summary judgment is proper when: (1) the movant shows that there is no genuine  
23 dispute as to any material fact; and (2) that after viewing the evidence most favorably to the  
24 non-moving party, the movant is entitled to prevail as a matter of law. Fed. R. Civ. P.  
25 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N.*  
26



1 *Am.*, 815 F.2d 1285, 1288-89 (9<sup>th</sup> Cir. 1987). “Only disputes over facts that might affect the  
2 outcome of the suit under governing [substantive] law will properly preclude the entry of  
3 summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A  
4 genuine issue of material fact arises only if the evidence is such that a reasonable jury could  
5 return a verdict for the nonmoving party. *Id.*

7 The non-moving party may not merely rest on its pleadings; it must produce some  
8 significant probative evidence tending to contradict the moving party’s allegations, thereby  
9 creating a material question of fact. *Anderson*, 477 U.S. at 256-57. The non-moving party  
10 must present more than “some metaphysical doubt as to the material facts. *Matsushita Elec.*  
11 *Indus. Co., Ltd v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Relying on conclusory  
12 allegations unsupported by factual data cannot defeat a summary judgment motion. *Taylor*  
13 *v. List*, 880 F.2d 1040, 1045 (9<sup>th</sup> Cir. 1989).

15  
16 **FIRST AMENDED COMPLAINT**

17 \*\*\*Note: There is a pending motion to amend the First Amended Complaint to assert  
18 a 42 U.S.C. 1983 claim against Rural Metro and to create a Second Amended Complaint.  
19 The proposed Second Amended Complaint does not change the legal claims against  
20 Defendants Sheriff Napier or Deputy Barnes that are found in the First Amended  
21 Complaint.  
22

23 Plaintiffs Robert Cutler and Renee Cutler are the parents and statutory beneficiaries  
24 of decedent David Cutler. Plaintiffs sued Pima County Sheriff Mark D. Napier (Sheriff  
25 Napier) in his official capacity, Pima County Sheriff Deputy Keith Barnes (Deputy Barnes)  
26

1 and wife Jane Doe Barnes. Plaintiffs also sued Rural/Metro Fire Department, Inc. and its  
2 Paramedic Grant Reed and wife Brittany Reed.

3 This motion for summary judgment is brought on behalf of Sheriff Mark D. Napier  
4 and Sheriff's Deputy Keith Barnes and wife Jane Doe Barnes.  
5

6 **COUNT ONE**

7 **Violation of Civil Rights under the Fourth, Eighth, and Fourteenth Amendments**  
8 **and 42 U.S.C. 1983 (Defendant Barnes)**

9 Count One is directed at Defendant Deputy Barnes only. There is no 42 USC 1983  
10 constitutional violation claim against Sheriff Mark Napier. There is no claim under *Monell*  
11 *v Department of Social Services*, 436 U.S. 658 (1978). Plaintiffs bring suit against Deputy  
12 Barnes alleging violations of the Fourth, Eighth, and Fourteenth Amendments to the U.S.  
13 Constitution.  
14

15 **The Fourth Amendment is not applicable**

16 Plaintiffs Robert Cutler and Renee Cutler have no Fourth Amendment claim arising  
17 from the death of their son David Cutler. A Fourth Amendment claim, such as excessive  
18 force, is individual, and may not be asserted vicariously. *Smith v. City of Fontana*, 818 F.2d  
19 1411, 1417 (9th Cir. 1987); see also, *Moreland v. City of Las Vegas*, 159 F.3d 365 (9th Cir.  
20 1998). In *Smith* the court specifically held: "The children were not directly subjected to the  
21 excessive use of state force and therefore cannot maintain personal causes of action under  
22 section 1983 in reliance on this Fourth Amendment theory." 818 F.2d at 1417.  
23  
24

25 Plaintiffs were not directly subjected to any use of force and therefore have no  
26

Fourth Amendment claim.

**The Eighth Amendment is not applicable**

The Eighth Amendment has no application here. The Eighth Amendment “cruel and unusual punishments” clause is not applicable until a subject has been convicted of a crime. *City of Revere v. Massachusetts General Hosp.*, 463 U.S. 239, 244 (1983). Decedent Cutler was not a convicted prisoner.

**The Fourteenth Amendment claim fails, lacking evidence that Deputy Barnes’ conduct amounted to objectively unreasonable deliberate indifference**

Plaintiffs bring a wrongful death claim under 42 USC § 1983 and the Fourteenth Amendment alleging that the decedent’s death interfered with Plaintiffs’ liberty interests in the companionship and society of their deceased son David Cutler.

Plaintiffs allege that Deputy Barnes failed to provide adequate care to Cutler while in Deputy Barnes’ custody. Claims for violations of the right to adequate medical care brought by pretrial detainees against individual defendants under the Fourteenth Amendment are evaluated under an “objectively unreasonable deliberate indifference” standard. *Gordon v. County of Orange*, 888 F.3d 1118, 1124-25, (9<sup>th</sup> Cir. 2018); *Castro v. County of Los Angeles*, 833 F.3d 1060, 1070-71 (9<sup>th</sup> Cir. 2016). The mere lack of due care does not deprive an individual of life, liberty, or property under the Fourteenth Amendment. *Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9<sup>th</sup> Cir. 2016); *Gordon v. County of Orange*, 888 F.3d at 1125. The conduct of Deputy Barnes must be shown to “be objectively unreasonable, a test that will necessarily ‘turn[ ] on the ‘facts and circumstances

1 of each particular case.” *Id.*, citations omitted.

2 Plaintiffs must prove two things: (1) that Deputy Barnes ***recklessly disregarded*** (2)  
3 an ***obvious substantial risk***. *Id.*, emphasis added. The “objectively unreasonable” test  
4 requires proving that the defendant did not take **reasonable** available measures to abate a  
5 substantial risk of serious harm, even though a reasonable officer in the circumstances  
6 would have appreciated the high degree of risk involved --- making the consequences of the  
7 defendant’s conduct obvious. *Gordon v. County of Orange*, 888 F.3d at 1125. See also,  
8 Ninth Circuit Model Civil Jury Instruction - 9.30, Revised June 2019. Here, Deputy  
9 Barnes’ decision to summon resources to get Cutler down the mountain to the ambulance as  
10 quickly as possible was a reasonable available measure taken to rescue Cutler. Deputy  
11 Barnes did not recklessly disregard the risks to Cutler.

14 None of the responders (not deputies or paramedics) took water or blankets with  
15 them up the hill. Cutler was initially quite alive, conscious, and physically active. Cutler  
16 was not cooperating. Cutler was resisting. Cutler was not asking for water. Cutler was not  
17 complaining about heat. Cutler was not complaining of pain. But it was clear that Cutler  
18 needed medical intervention. Deputy Barnes radioed for meds less than one minute after  
19 Deputy Barnes confronted Cutler. Deputy Barnes chose to summon all the resources  
20 necessary to get Cutler off the hill and to the ambulance as quickly as possible. The  
21 remoteness of the location, the ruggedness of the terrain, and Cutler’s own resistive and  
22 combative conduct greatly complicated his own rescue. No reasonable jury could conclude  
23 that Deputy Barnes deliberately or recklessly disregarded a substantial risk of harm to  
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Cutler. Deputy Barnes is entitled to summary judgment on Count One.

### **QUALIFIED IMMUNITY**

Qualified immunity provides immunity to officers from claims for constitutional violations. It protects all but the plainly incompetent or those who knowingly violate the law. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Qualified immunity protects officials who make reasonable but mistaken judgments about open legal question. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). “Qualified immunity is an entitlement not to stand trial.” *Saucier v. Katz*, 533 U.S. 194 (2001). Qualified immunity is immunity from suit rather than a mere defense to liability. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Saucier v. Katz*, 533 U.S. 194 (2001).

The analysis involves a two-step process. First, a court must decide whether there is a constitutional violation. Second, if there is a constitutional violation, the court must decide whether the right at issue was “clearly established” at the time of the defendant’s alleged misconduct. 533 U.S., at 201.

#### **1. There is no constitutional violation**

The standard for a 14<sup>th</sup> Amendment substantive due process violation is “objectively unreasonable deliberate indifference”. Negligence or lack of due care is insufficient. The evidence in this case does not rise to the level of objectively unreasonable deliberate indifference by Deputy Barnes.

#### **2. No clearly established law was violated**

There is no clearly established law that says that Deputy Barnes violated Plaintiffs’

The threshold for determining whether a governmental official’s conduct violates clearly established law requires a determination that at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right. A case directly on point is not required, but existing precedent must have placed the statutory or constitutional question beyond debate. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). A robust consensus of cases of persuasive authority is required. (*Id.*) It is inappropriate to define clearly established law at a high degree of generality. (*Id.*) “The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established. (*Id.*) In other words, the question of whether there exists clearly established law must focus on the specific conduct in the specific circumstances at issue.

Deputy Barnes is entitled to qualified immunity.

**COUNT TWO**

**Wrongful Death Pursuant to ARS 12-611 (All Defendants)**

Count Two alleges a wrongful death claim against Deputy Barnes and a respondeat superior claim against Sheriff Napier. The claim is that Deputy Barnes breached a duty to exercise ordinary care towards Cutler by 1) not providing necessary medical care to Cutler while Cutler was in custody, 2) failing to provide water to Cutler, 3) for using excessive

1 force on Cutler, 4) for not providing immediate care for Cutler's heat-related distress, and 5)  
2 for requesting sedation that was unnecessary and potentially dangerous.

3 **1) Not providing necessary medical care to Cutler**

4 Deputy Barnes called (radioed) for meds (medical assistance) in less than one minute  
5 after he came face to face with Cutler. There was a short delay in medical assistance  
6 arriving, because Deputy Barnes radioed that Cutler was being combative. There is no  
7 credible evidence that the few minutes delay in meds arriving caused or contributed to  
8 causing Cutler's death. Moreover, the evidence is overwhelming that Cutler was  
9 uncooperative, resistive, non-compliant, and combative.  
10  
11

12 **2) Failing to provide water to Cutler**

13 Deputy Barnes did not have water on his person or in his patrol vehicle. Of the  
14 approximately six responders to the hilltop, (four deputies, a paramedic, an EMT), none of  
15 them had water on their persons or with any of their gear. The sole objective was to get  
16 Cutler off the top of the hill, to the ambulance, and to the hospital.  
17

18 **(3) Using excessive force on Cutler**

19 There is no evidence that Deputy Barnes used excessive force. Deputy Barnes  
20 handcuffed Cutler and when Cutler turned to run away, Deputy Barnes took Cutler to the  
21 ground for Cutler's own safety. The medical examiner ruled out blunt force trauma,  
22 strangulation or burns from being on the ground or on rocks. Deputy Dittmer applied a  
23 RIPP restraint on Cutler's legs for his own safety, to prevent Cutler from getting up and  
24 running away. Deputy Barnes inserted his boot between Cutler's face and the rocks to  
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26

1 protect Cutler from harming himself.

2 The standard of care for a law enforcement officer's use of force is best articulated in  
3 *Graham v. Conner*, 490 U.S. 386 (1989).

4 The "reasonableness" of a particular use of force must be judged from the  
5 perspective of a reasonable officer on the scene, rather than with the 20/20  
6 vision of hindsight. \*\*\* The calculus of reasonableness must embody  
7 allowance for the fact that police officers are often forced to make split-second  
8 judgments---in circumstances that are tense, uncertain, and rapidly evolving---  
9 about the amount of force that is necessary in a particular situation. *Graham v.*  
10 *Connor*, 490 U.S. at 396-97.

11 No reasonable interpretation of the evidence in this case could lead a reasonable juror  
12 to conclude that Deputy Barnes used excessive force on Cutler.

13 **(4) For not providing immediate care for Cutler's heat-related distress**

14 Deputy Barnes immediately called for medical assistance. Rural Metro medical  
15 providers hesitated for only a few minutes because Deputy Barnes said that Cutler was  
16 combative. Cutler was indeed combative as Rural Metro Paramedic Reed testified that  
17 when he arrived at the bottom of the hill, he saw Cutler at the top of the hill fighting with  
18 the deputies, flailing back and forth, kicking, flailing, and tossing the deputies around.  
19 (SSOF 79.) That delay for only a few minutes was not unreasonable under the  
20 circumstances. In any event, there is no evidence that the few minutes delay in Rural Metro  
21 getting to Cutler on the hilltop caused or contributed to Cutler's death.

22 **(5) For requesting sedation that was unnecessary and potentially dangerous**

23 There is no evidence that Defendant Deputy Barnes personally requested sedation for  
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1 Cutler. There are communications from Deputy West to dispatch to the effect that maybe  
2 Rural Metro could give Cutler something to calm him down. (SSOF 85.) First, Deputy  
3 West is not a defendant. Second, a suggestion of that nature by a law enforcement officer to  
4 a medical provider could not rise to the level of an actionable claim under any application of  
5 the law.  
6

### 7 **PUNITIVE DAMAGES**

8 Arizona Revised Statute 12-820.04 prohibits liability for punitive damages against  
9 public officers acting in the course and scope of their employment. Defendants Sheriff  
10 Napier and Deputy Barnes are immune from punitive damages for the wrongful death claim  
11 asserted in Count Two.  
12

13 Federal law allows punitive damages against public officers in their individual  
14 capacity only. Defendant Sheriff Napier is sued in his official capacity only and is therefore  
15 immune from punitive damages in this federal civil rights case. See, *City of Newport v.*  
16 *Fact Concerts, Inc.*, 453 U.S. 247, 259-71 (1981).  
17

18 Deputy Barnes can be liable for punitive damages for the federal claims in this  
19 lawsuit, but only if there is sufficient evidence for that issue to go to the jury. The federal  
20 punitive damages standard requires essentially the same proof as the Plaintiffs' claim of  
21 Fourteenth Amendment violation arising from the death of their son David Cutler. In  
22 *Castro v. County of Los Angeles*, 797 F.3d 654, 699 (9<sup>th</sup> Cir. 2015) the court allowed  
23 punitive damages to go to the jury where the claim was that the defendant's conduct evinced  
24 reckless or callous indifference to others' rights. Since, as discussed above, Plaintiffs'  
25  
26

1 Fourteenth Amendment claim fails as a matter of law, so fails the claim for punitive  
2 damages on the Fourteenth Amendment claim.

3  
4 **CONCLUSION**

5 Plaintiffs, surviving parents of their son David Cutler, cannot bring a claim under the  
6 Fourth Amendment. The Eighth Amendment is not applicable to an arrestee or pretrial  
7 detainee, such as Cutler. The Fourteenth Amendment does apply, but as a matter of law no  
8 reasonable juror could conclude that Deputy Barnes' conduct constituted objectively  
9 unreasonable deliberate indifference. Deputy Barnes is entitled to qualified immunity. The  
10 punitive damages claim related to the Fourteenth Amendment claim fails with the  
11 Fourteenth Amendment claim. The punitive damages claim related to the state law  
12 Wrongful Death claim is barred by ARS 12-820.04.

14 Plaintiffs' claims should be dismissed in their entirety with regard to these  
15 Defendants, Sheriff Napier, Deputy Barnes and Jane Doe Barnes.  
16

17  
18 DATED this 4<sup>th</sup> day of September, 2020.

19 *AUDILETT LAW PC*

20  
21 /s/ Daryl Audilett

22 \_\_\_\_\_  
23 Daryl A. Audilett  
24 Attorney for Defendants Napier and Barnes  
25  
26

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2020, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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